

Department of the Army, DoD

§ 518.16

order of a Federal court, Army Activities shall release information along with a description of the restrictions on its release to the public;

(viii) *Disciplinary actions and criminal investigations.* Requests for access to, or information from, the records of disciplinary actions or criminal investigations will be honored if proper credentials are presented. Representatives of the Office of Personnel Management may be given information from personnel files of employees actually employed at organizations or activities. Each such request will be considered on its merits. The information released will be the minimum required in connection with the investigation being conducted.

(ix) *Other types of requests.* All other official requests received by DA elements from agencies of the executive branch (including other military departments) will be honored, if there are no compelling reasons to the contrary. If there are reasons to withhold the records, the requests will be submitted for determination of the propriety of release to the appropriate addresses shown in Appendix B of this part.

(2) Army Activities shall inform officials receiving records under the provisions of this section that those records are exempt from public release under the FOIA. Army Activities also shall advise officials of any special handling instructions. Classified information is subject to the provisions of DoD 5200.1-R, and information contained in Privacy Act systems of records is subject to DoD 5400.11-R.

(e) *Consultation with affected DoD component.* (1) When an Army Activity receives a FOIA request for a record in which an affected Army or DoD organization (including a Combatant Command) has a clear and substantial interest in the subject matter, consultation with that affected Army or DoD organization is required. As an example, where an Army Activity receives a request for records related to DoD operations in a foreign country, the cognizant Combatant Command for the area involved in the request shall be consulted before a release is made. Consultations may be telephonic, electronic, or in hard copy.

(2) The affected Activity shall review the circumstances of the request for host-nation relations, and provide, where appropriate, FOIA processing assistance to the responding DoD Component regarding release of information. Responding Army Activities shall provide copies of responsive records to the affected DoD Component when requested. The affected DoD Component shall receive a courtesy copy of all releases in such circumstances.

(3) Nothing in § 518.19 shall impede the processing of the FOIA request initially received by an Army Activity.

[71 FR 9222, Feb. 22, 2006, as amended at 78 FR 18474, Mar. 27, 2013]

§ 518.16 Initial determinations.

(a) *Initial denial authority.* The DA officials are designated as the Army's only IDAs. Only an IDA, his or her delegate, or the Secretary of the Army can deny FOIA requests for DA records. Each IDA will act on direct and referred requests for records within his or her area of functional responsibility. (See the proper AR in the 10 series for full discussions of these areas. Included are records created or kept within the IDA's area of responsibility; records retired by, or referred to, the IDA's headquarters or office; and records of predecessor organizations. If a request involves the areas of more than one IDA, the IDA to whom the request was originally addressed will normally respond to it; however, the affected IDAs may consult on such requests and agree on responsibility for them. IDAs will complete all required coordination at initial denial level. This includes classified records retired to the NARA when a mandatory declassification review is necessary. Requests and/or responsive documents should not be sent to the DA FOIA/PA Office for initial denial authority or to forward to other offices within the DA.

(b) FOIA requesters may ultimately appeal if they are dissatisfied with adverse determinations. It is crucial to forward complete packets to the IDAs. Ensure cover letters list all attachments and describe from where the records were obtained, *i.e.*, a PA system of records (including the applicable systems notice), or other. If a FOIA

action is complicated, include a chronology of events to assist the IDA in understanding what happened in the course of processing the FOIA request. If a file does not include documentation described below, include the tab, and insert a page marked “not applicable” or “not used.” The order and contents of FOIA file attachments follow: (Tab A or 1) The original FOIA request and envelope (if applicable); (Tab B or 2) The response letter; (Tab C or 3) Copies of all records entirely released, single-sided; (Tab D or 4) Copies of administrative processing documents, including extension letters and “no records” certificates, in chronological order; (Tab E or 5) Copies of all records partially released or entirely denied, single-sided. For partially released records, mark in yellow highlighter (or other readable highlighter) those portions withheld; and (Tab F or 6) Legal opinions(s).

(c) The initial determination of whether to make a record available or grant a fee waiver upon request may be made by any suitable official designated by the Army Activity in published regulations. The presence of the marking “FOUO” does not relieve the designated official of the responsibility to review the requested record for the purpose of determining whether an exemption under this part is applicable and should be invoked. IDAs may delegate all or part of their authority to a division chief under its supervision within the Agency in the grade of 05/civilian equivalent. Requests for delegation authority below this level must be submitted, after coordination, to the DA FOIA/PA Office, with detailed justification, for approval. Such delegations must not slow FOIA actions. If an IDA’s delegate denies a FOIA or fee waiver request, the delegate must clearly state that he or she is acting for the IDA and identify the IDA by name and position in the written response to the requester. IDAs will send only the names, offices, and telephone numbers of their delegates to the DA, FOIA/PA Office. IDAs will keep this information current.

(d) The officials designated by Army Activities to make initial determinations should consult with public affairs officers (PAOs) to become familiar

with subject matters that are considered to be newsworthy, and advise PAOs of all requests from news media representatives. In addition, the officials should inform PAOs in advance when they intend to withhold or partially withhold a record, if it appears that the withholding action may be challenged in the media. A FOIA release or denial action, appeal, or court review may generate public or press interest. In such case, the IDA (or delegate) should consult the Chief of Public Affairs or the command or organization PAO. The IDA should inform the PAO contacted of the issue and obtain advice and recommendations on handling its public affairs aspect. Any advice or recommendations requested or obtained should be limited to this aspect. Coordination must be completed within the statutory 20 working day FOIA response limit. (The point of contact for the Army Chief of Public Affairs is HQDA (SAPA-OSR), Washington DC 20310-1500). If the request involves actual or potential litigation against the United States, release must be coordinated with The Judge Advocate General (TJAG).

(e) The following officials are designated IDAs for the areas of responsibility outlined below:

(1) The Administrative Assistant to the Secretary of the Army is authorized to act for the Secretary of the Army on requests for all records maintained by the Office of the Secretary of the Army and its serviced activities as well as requests requiring the personal attention of the Secretary of the Army. This also includes civilian Equal Employment Opportunity (EEO) actions. (See DCS, G-1 for military Equal Opportunity (EO) actions). The Administrative Assistant to the Secretary of the Army has delegated its authority to the Chief Attorney and Legal Services Directorate, U.S. Army Resources & Programs Agency. (See DCS, G-1 for military Equal Opportunity (EO) actions).

(2) The Assistant Secretary of the Army (Financial Management and Comptroller) is authorized to act on requests for finance and accounting records. Requests for CONUS finance

Department of the Army, DoD

§518.16

and accounting records should be referred to the Defense Finance and Accounting Service (DFAS). The Chief Attorney and Legal Services Directorate, acts on requests for non-finance and accounting records of the Assistant Secretary of the Army (Financial Management and Comptroller).

(3) The Assistant Secretary of the Army (Acquisition, Logistics, & Technology) is authorized to act on requests for procurement records other than those under the purview of the Chief of Engineers and the Commander, U.S. Army Materiel Command. The Chief Attorney and Legal Services Directorate, acts on requests for non-procurement records of the Assistant Secretary of the Army (Acquisition, Logistics and Technology).

(4) The Deputy Assistant Secretary of the Army (Civilian Personnel Policy)/Director of Civilian Personnel, Office of the Assistant Secretary of the Army (Manpower and Reserve Affairs) is authorized to act on requests for civilian personnel records, personnel administration and other civilian personnel matters, except for EEO (civilian) matters which will be acted on by the Administrative Assistant to the Secretary of the Army. The Deputy Assistant Secretary of the Army (Civilian Personnel Policy)/Director of Civilian Personnel has delegated this authority to the Chief, Policy and Program Development Division.

(5) The Chief Information Officer, G-6 is authorized to act on requests for records pertaining to Army Information Technology, command, control communications and computer systems and the Information Resources Management Program (automation, telecommunications, visual information, records management, publications and printing).

(6) The Inspector General is authorized to act on requests for all Inspector General Records.

(7) The Auditor General is authorized to act on requests for records relating to audits done by the U.S. Army Audit Agency under AR 10-2. This includes requests for related records developed by the Audit Agency.

(8) The Director of the Army Staff is authorized to act on requests for all records of the Chief of Staff and its

Field Operating Agencies. The Director of the Army Staff has delegated its authority to the Chief Attorney and Legal Services Directorate, U.S. Army Resources & Programs Agency. The Chief Attorney and Legal Services Director, U.S. Army Resources & Programs Agency acts on requests for records of the Chief of Staff and its Field Operating Agencies. (See TJAG for the (GOMO) actions).

(9) The Deputy Chief of Staff, G-3 is authorized to act on requests for records relating to International Affairs policy, planning, integration and assessments, strategy formulation, force development, individual and unit training policy, strategic and tactical command and control systems, nuclear and chemical matters, use of DA forces.

(10) The Deputy Chief of Staff, G-8 is authorized to act on requests for records relating to programming, material integration and externally directed reviews.

(11) The Office of the Deputy Chief of Staff, G-1 is authorized to act on the following records: Personnel board actions, Equal Opportunity (military) and sexual harassment, health promotions, physical fitness and well being, command and leadership policy records, HIV and suicide policy, substance abuse programs except for individual treatment records which are the responsibility of the Surgeon General, retiree benefits, services, and programs, (excluded are individual personnel records of retired military personnel, which are the responsibility of the U.S. Army Human Resources Command-St. Louis (AHRC-STL), DA dealings with Veterans Affairs, U.S. Soldier's and Airmen's Home, retention, promotion, and separation; recruiting and MOS policy issues, personnel travel and transportation entitlements, military strength and statistics, The Army Librarian, demographics, and Manprint.

(12) The Deputy Chief of Staff, G-4 is authorized to act on requests for records relating to DA logistical requirements and determinations, policy concerning materiel maintenance and use, equipment standards, and logistical readiness.

(13) The Chief of Engineers is authorized to act on requests for records involving civil works, military construction, engineer procurement, and ecology; and the records of the U.S. Army Engineer divisions, districts, laboratories, and field operating agencies.

(14) The Surgeon General, Commander, U.S. Army Medical Command, is authorized to act on requests for medical research and development records, and the medical records of active duty military personnel, dependents, and persons given physical examination or treatment at DA medical facilities, to include alcohol and drug treatment/test records.

(15) The Chief of Chaplains is authorized to act on requests for records involving ecclesiastical relationships, rites performed by DA chaplains, and nonprivileged communications relating to clergy and active duty chaplains' military personnel files.

(16) The Judge Advocate General is authorized to act on requests for records relating to claims, courts-martial, legal services, administrative investigations, and similar legal records. TJAG is also authorized to act on requests for the GOMO actions and records described elsewhere in this regulation, especially if those records relate to litigation in which the United States has an interest. In addition, TJAG is authorized to act on requests for records that are not within the functional areas of responsibility of any other IDA, including, but not limited to requests for records for Commands, and activities.

(17) The Chief, National Guard Bureau, is authorized to act on requests for all personnel and medical records of retired, separated, discharged, deceased, and active Army National Guard military personnel, including technician personnel, unless such records clearly fall within another IDA's responsibility. This authority includes, but is not limited to, National Guard organization and training files; plans, operations, and readiness files, policy files, historical files, files relating to National Guard military support, drug interdiction, and civil disturbances; construction, civil works, and ecology records dealing with armories, facilities within the States,

ranges, etc. Equal Opportunity investigative records; aviation program records and financial records dealing with personnel, operation and maintenance, and equipment budgets.

(18) The Chief of Army Reserve is authorized to act on requests for all personnel and medical records of retired, separated, discharged, deceased, and reserve component military personnel, and all U.S. Army Reserve (USAR) records, unless such records clearly fall within another IDA's responsibility. Records under the responsibility of the Chief of Army Reserve include records relating to USAR plans, policies, and operations; changes in the organizational status of USAR units; mobilization and demobilization policies, active duty tours, and the Individual Mobilization Augmentation program.

(19) The Commander, United States Army Materiel Command (AMC) is authorized to act on requests for the records of AMC headquarters and to subordinate commands, units, and activities that relate to procurement, logistics, research and development, and supply and maintenance operations.

(20) The Provost Marshal General (PMG) is authorized to act on all requests for provost marshal activities and law enforcement functions for the army, all matters relating to police intelligence, physical security, criminal investigations, corrections and internment (to include confinement and correctional programs for U.S. prisoners, criminal investigations, provost marshal activities, and military police support. The PMG is responsible for the Office of Security, Force Protection, and Law Enforcement Division and is the functional proponent for AR 190-series (Military Police) and 195-series (Criminal Investigation), AR 630-10 Absent Without Leave, Desertion, and Administration of Personnel Involved in Civilian Court Proceedings, and AR 633-30, Military Sentences to Confinement.

(21) The Commander, U.S. Army Criminal Investigation Command (USACIDC), is authorized to act on requests for criminal investigative records of USACIDC headquarters, its subordinate activities, and military police reports. This includes criminal investigation records, investigation-in-

Department of the Army, DoD

§518.16

progress records, and all military police records and reports.

(22) The Commander, United States Army Human Resources Command (USAHRC), is authorized to act on requests for military personnel files relating to active duty (other than those of reserve and retired personnel) military personnel matters, personnel locator, physical disability determinations, and other military personnel administration records; records relating to military casualty and memorialization activities; heraldic activities, voting, records relating to identification cards, naturalization and citizenship, commercial solicitation, Military Postal Service Agency and Army postal and unofficial mail service.

(23) The Commander, USARC-StL has been delegated authority to act on behalf of the USAHRC for requests concerning all personnel and medical records of retired, separated, discharged, deceased, and reserve component military personnel, unless such records clearly fall within another IDA's authority. The authority does not include records relating to USAR plans, policies, and operations; changes in the organizational status of USAR units, mobilization and demobilization policies; active duty tours, and the individual mobilization augmentation program.

(24) The Assistant Chief of Staff for Installation Management (ACSIM) is authorized to act on requests for records relating to planning, programming, execution and operation of Army installations. This includes base realignment and closure activities, environmental activities other than litigation, facilities and housing activities, and installation management support activities.

(25) The Commander, United States Army Intelligence and Security Command, is authorized to act on requests for intelligence and security records, foreign scientific and technological records, intelligence training, intelligence threat assessments, and foreign liaison information.

(26) The Commander, U.S. Army Safety Center, is authorized to act on requests for Army safety records.

(27) The Commander, United States Army Test and Evaluation Command

(ATEC), is authorized to act on requests for the records of ATEC headquarters, its subordinate commands, units, and activities that relate to test and evaluation operations.

(28) The General Counsel, Army and Air Force Exchange Service (AAFES), is authorized to act on requests for AAFES records, under AR 60-20/AFR 147-14.

(29) Special IDA authority for time-event related records may be designated on a case-by-case basis. These will be published in the FEDERAL REGISTER. You may contact the DA, FOIA/PA Office to obtain current information on special delegations.

(f) *Reasons for not releasing a record.* The following are reasons for not complying with a request for a record under 5 U.S.C. 552(a)(3).

(1) *No records.* A reasonable search of files failed to identify responsive records. The records custodian will prepare a detailed no records certificate. This certificate must include, at a minimum, what areas or offices were searched and how the search was conducted (manually, by computer, etc.). The certificate will be signed by the records custodian and will include his or her grade and title. The original certificate will be forwarded to the IDA. Preprinted "check-the-block" or "fill-in-the-blank" no records certificates are not authorized.

(2) *Referrals.* The request is transferred to another Army Activity or DoD Component, or to another Federal Agency.

(3) *Request withdrawn.* The request is withdrawn by the requester.

(4) *Fee-related reason.* The requester is unwilling to pay fees associated with a request; the requester is past due in the payment of fees from a previous FOIA request; or the requester disagrees with the fee estimate.

(5) *Records not reasonably described.* A record has not been described with sufficient particularity to enable the Army or DoD Component to locate it by conducting a reasonable search.

(6) *Not a proper FOIA request for some other reason.* The requester has failed unreasonably to comply with procedural requirements, other than fee-related, imposed by this part or Army Activity supplementing regulations.

(7) *Not an agency record.* The information requested is not a record within the meaning of the FOIA and this part.

(8) *Duplicate request.* The request is a duplicate request (e.g., a requester asks for the same information more than once). This includes identical requests received via different means (e.g., electronic mail, facsimile, mail, and courier) at the same or different times.

(9) *Other (specify).* Any other reason a requester does not comply with published rules other than those outlined in paragraphs (f)(1) through (8) of this section.

(10) *Partial or total denial.* The record is denied in whole or in part in accordance with procedures set forth in the FOIA.

(g) *Denial tests.* To deny a requested record that is in the possession and control of an Army Activity, it must be determined that the record is exempt under one or more of the exemptions of the FOIA. An outline of the FOIA's exemptions is contained in subpart C of this part.

(h) *Reasonably segregable portions.* Although portions of some records may be denied, the remaining reasonably segregable portions must be released to the requester when it reasonably can be assumed that a skillful and knowledgeable person could not reconstruct the excised information. Unless indicating the extent of the deletion would harm an interest protected by an exemption, the amount of deleted information shall be indicated on the released portion of paper records by use of brackets or darkened areas indicating removal of information. In no case shall the deleted areas be left "white" without the use of brackets to show the bounds of deleted information. In the case of electronic deletion, or deletion in audiovisual or microfiche records, if technically feasible, the amount of redacted information shall be indicated at the place in the record such deletion was made, unless including the indication would harm an interest protected by the exemption under which the deletion is made. This may be done by use of brackets, shaded areas, or some other identifiable technique that will clearly show the limits of the deleted information. When a record is denied in whole, the response

advising the requester of that determination will specifically state that it is not reasonable to segregate portions of the record for release.

(i) *Response to requester.* Whenever possible, initial determinations to release or deny a record normally shall be made and the decision reported to the requester within 20 working days after receipt of a proper request by the official designated to respond. When an Army Activity has a significant number of pending requests which prevent a response determination within the 20 working day period, the requester shall be so notified in an interim response, and advised whether their request qualifies for the fast track or slow track within the Army Activity's multitrack processing system. Requesters who do not meet the criteria for fast track processing shall be given the opportunity to limit the scope of their request in order to qualify for fast track processing.

(1) When a decision is made to release a record, a copy should be made available promptly to the requester once he has complied with preliminary procedural requirements.

(2) When a request for a record is denied in whole or in part, the official designated to respond shall inform the requester in writing of the name and title or position of the official who made the determination, and shall explain to the requester the basis for the determination in sufficient detail to permit the requester to make a decision concerning appeal. The requester specifically shall be informed of the exemptions on which the denial is based, inclusive of a brief statement describing what the exemption(s) cover. When the initial denial is based in whole or in part on a security classification, the explanation should include a summary of the applicable Executive Order criteria for classification, as well as an explanation, to the extent reasonably feasible, of how those criteria apply to the particular record in question. The requester shall also be advised of the opportunity and procedures for appealing an unfavorable determination to a higher final authority within the Army Activity. The IDA will inform the requester of his or her right to appeal, in whole or part, the denial of the FOIA

Department of the Army, DoD

§ 518.16

or fee waiver request and that the appeal must be sent through the IDA to the Secretary of the Army (ATTN: OGC).

(3) The final response to the requester should contain information concerning the fee status of the request, consistent with the provisions of subpart F, of this part. When a requester is assessed fees for processing a request, the requester's fee category shall be specified in the response letter. Activities also shall provide the requester with a complete cost breakdown (e.g., 115 pages of office reproduction at \$0.15 per page; 5 minutes of computer search time at \$43.50 per minute, 3 hours of professional level search at \$44 per hour, etc.) in the response letter.

(4) The explanation of the substantive basis for a denial shall include specific citation of the statutory exemption applied under provisions of this part; e.g., 5 U.S.C. 552 (b)(1). Merely referring to a classification; to a "FOUO" marking on the requested record; or to this part or an Army Activity's regulation does not constitute a proper citation or explanation of the basis for invoking an exemption.

(5) When the time for response becomes an issue, the official responsible for replying shall acknowledge to the requester the date of the receipt of the request.

(6) When denying a request for records, in whole or in part, an Army Activity shall make a reasonable effort to estimate the volume of the records denied and provide this estimate to the requester, unless providing such an estimate would harm an interest protected by an exemption of the FOIA. This estimate should be in number of pages or in some other reasonable form of estimation, unless the volume is otherwise indicated through deletions on records disclosed in part.

(7) When denying a request for records in accordance with a statute qualifying as a FOIA exemption 3 statute, Army Activities shall, in addition to stating the particular statute relied upon to deny the information, also state whether a court has upheld the decision to withhold the information under the particular statute, and a

concise description of the scope of the information being withheld.

(j) *Extension of time.* In unusual circumstances, when additional time is needed to respond to the initial request, the Army Activity shall acknowledge the request in writing within 20 working days, describe the circumstances requiring the delay, and indicate the anticipated date for a substantive response that may not exceed 10 additional working days, except as provided below:

(1) With respect to a request for which a written notice has extended the time limits by 10 additional working days, and the Activity determines that it cannot make a response determination within that additional 10 working day period, the requester shall be notified and provided an opportunity to limit the scope of the request so that it may be processed within the extended time limit, or an opportunity to arrange an alternative time frame for processing the request or a modified request. Refusal by the requester to reasonably modify the request or arrange for an alternative time frame shall be considered a factor in determining whether exceptional circumstances exist with respect to Army Activity's request backlogs. Exceptional circumstances do not include a delay that results from predictable activity backlogs, unless the Army Activity demonstrates reasonable progress in reducing its backlog.

(2) Unusual circumstances that may justify delay are: The need to search for and collect the requested records from other facilities that are separate from the office determined responsible for a release or denial decision on the requested information; the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are requested in a single request; and the need for consultation, which shall be conducted with all practicable speed, with other agencies having a substantial interest in the determination of the request, or among two or more Army Activities or DoD Components having a substantial subject-matter interest in the request.

(3) Army Activities may aggregate certain requests by the same requester,

or by a group of requesters acting in concert, if the Army Activity reasonably believes that such requests actually constitute a single request, which would otherwise satisfy the unusual circumstances set forth in paragraph (j)(2) of this section, and the requests involve clearly related matters. Multiple requests involving unrelated matters shall not be aggregated. If the requests are aggregated under these conditions, the requester or requesters shall be so notified.

(4) In cases where the statutory time limits cannot be met and no informal extension of time has been agreed to, the inability to process any part of the request within the specified time should be explained to the requester with a request that he agree to await a substantive response by an anticipated date. It should be made clear that any such agreement does not prejudice the right of the requester to appeal the initial decision after it is made. Army Activities are reminded that the requester still retains the right to treat this delay as a de facto denial with full administrative remedies. Only the responsible IDA can extend it, and the IDA must first coordinate with the OGC.

(5) As an alternative to the taking of formal extensions of time the negotiation by the cognizant FOIA coordinating office of informal extensions in time with requesters is encouraged where appropriate.

(k) *Misdirected requests.* Misdirected requests shall be forwarded promptly to the Army Activity or other Federal Agency with the responsibility for the records requested. The period allowed for responding to the request misdirected by the requester shall not begin until the request is received by the Army Activity that manages the records requested.

(l) *Records of non-U.S. Government source.* When a request is received for a record that falls under exemption 4, that was obtained from a non-U.S. Government source, or for a record containing information clearly identified as having been provided by a non-U.S. Government source, the source of the record or information [also known as “the submitter” for matters pertaining to proprietary data under 5 U.S.C. 552,

FOIA, Exemption (b)(4)] and E.O. 12600], shall be notified promptly of that request and afforded reasonable time (14 calendar days) to present any objections concerning the release, unless it is clear that there can be no valid basis for objection. This practice is required for those FOIA requests for data not deemed clearly exempt from disclosure under exemption (b)(4) of 5 U.S.C. 552, The FOIA. If, for example, the record or information was provided with actual or presumptive knowledge of the non-U.S. Government source and established that it would be made available to the public upon request, there is no obligation to notify the source. Any objections shall be evaluated. The final decision to disclose information claimed to be exempt under exemption (b)(4) shall be made by an official equivalent in rank to the official who would make the decision to withhold that information under FOIA. When a substantial issue has been raised, the Army Activity may seek additional information from the source of the information and afford the source and requester reasonable opportunities to present their arguments on the legal and substantive issues involved prior to making an agency determination. When the source seeks a restraining order or take court action to prevent release of the record or information, the requester shall be notified, and action on the request normally shall not be taken until after the outcome of that court action is known. When the requester brings court action to compel disclosure, the submitter shall be promptly notified of this action.

(1) If the submitted information is a proposal in response to a solicitation for a competitive proposal, and the proposal is in the possession and control of DA (see 10 U.S.C. 2305(g)), the proposal shall not be disclosed, and no submitter notification and subsequent analysis is required. The proposal shall be withheld from public disclosure pursuant to 10 U.S.C. 2305(g) and exemption (b)(3) of the FOIA. This statute does not apply to bids, unsolicited proposals, or any proposal that is set forth or incorporated by reference in a contract between an Army Activity and

Department of the Army, DoD

§518.16

the offeror that submitted the proposal. In such situations, normal submitter notice shall be conducted except for sealed bids that are opened and read to the public. The term, proposal, means information contained in or originating from any proposal, including a technical, management, or cost proposal submitted by an offeror in response to solicitation for a competitive proposal, but does not include an offeror's name or total price or unit prices when set forth in a record other than the proposal itself. Submitter notice, and analysis as appropriate, are required for exemption (b)(4) matters that are not specifically incorporated in 10 U.S.C. 2305(g).

(2) If the record or information was submitted on a strictly voluntary basis, absent any exercised authority that prescribes criteria for submission, and after consultation with the submitter, it is absolutely clear that the record or information would customarily not be released to the public, the submitter need not be notified. Examples of exercised authorities prescribing criteria for submission are statutes, Executive Orders, regulations, invitations for bids, requests for proposals, and contracts. Records or information submitted under these authorities are not voluntary in nature. When it is not clear whether the information was submitted on a voluntary basis, absent any exercised authority, and whether it would customarily be released to the public by the submitter, notify the submitter and ask that it describe its treatment of the information, and render an objective evaluation. If the decision is made to release the information over the objection of the submitter, notify the submitter and afford the necessary time to allow the submitter to seek a restraining order, or take court action to prevent release of the record or information.

(3) The coordination provisions of this section also apply to any non-U.S. Government record in the possession and control of the Army or DoD from multi-national organizations, such as the North Atlantic Treaty Organization (NATO), United Nations Commands, the North American Aerospace Defense Command (NORAD), the Inter-American Defense Board, or foreign

governments. Coordination with foreign governments under the provisions of this section may be made through Department of State, or the specific foreign embassy.

(m) *File of initial denials.* Copies of all initial withholdings or denials shall be maintained by each Army Activity in a form suitable for rapid retrieval, periodic statistical compilation, and management evaluation. Records denied for any of the reasons contained in §518.20 shall be maintained for a period of six years to meet the statute of limitations requirement. Records will be maintained in accordance with AR 25-400-2.

(n) *Special mail services.* Army Activities are authorized to use registered mail, certified mail, certificates of mailing, and return receipts. However, their use should be limited to instances where it appears advisable to establish proof of dispatch or receipt of FOIA correspondence. The requester shall be notified that they are responsible for the full costs of special services.

(o) *Receipt accounts.* The Treasurer of the United States has established two accounts for FOIA receipts, and all money orders or checks remitting FOIA fees should be made payable to the U.S. Treasurer. These accounts shall be used for depositing all FOIA receipts, except receipts for industrially funded and non-appropriated funded activities. Components are reminded that the below account numbers must be preceded by the appropriate disbursing office two digit prefix. Industrially funded and non-appropriated funded activity FOIA receipts shall be deposited to the applicable fund.

(1) Receipt Account 3210 Sale of Publications and Reproductions, FOIA. This account shall be used when depositing funds received from providing existing publications and forms that meet the Receipt Account Series description found in Federal Account Symbols and Titles. Deliver collections within 30 calendar days to the servicing finance and accounting office.

(2) Receipt Account 3210 Fees and Other Charges for Services, FOIA. This account is used to deposit search fees, fees for duplicating and reviewing (in the case of commercial requesters) records to satisfy requests that could

not be filled with existing publications or forms.

§518.17 Appeals.

(a) *General.* If the official designated by the Army Activity to make initial determinations on requests for records declines to provide a record because the official considers it exempt under one or more of the exemptions of the FOIA, that decision may be appealed by the requester, in writing, to a designated appellate authority. The appeal should be accompanied by a copy of the letter denying the initial request. Such appeals should contain the basis for disagreement with the initial refusal. Appeal procedures also apply to the disapproval of a fee category claim by a requester, disapproval of a request for waiver or reduction of fees, disputes regarding fee estimates, review on an expedited basis a determination not to grant expedited access to agency records, for no record determinations when the requester considers such responses adverse in nature, not providing a response determination to a FOIA request within the statutory time limits, or any determination found to be adverse in nature by the requester. Upon an IDA's receipt of a no records determination appeal, the IDA will direct the records custodian to conduct another records search and certify, in writing, that it has made a good faith effort that reasonably could be expected to produce the information requested. If no records are again found, the original no records certificate will be forwarded to the IDA for inclusion in the appeals packet. When denials have been made under the provisions of the FOIA and the PA, and the denied information is contained in a PA system of records, appeals shall be processed under both the FOIA and the PA. If the denied information is not maintained in a PA system of records, the appeal shall be processed under the FOIA. If a request is merely misaddressed, and the receiving Army Activity or DoD Component simply advises the requester of such and refers the request to the appropriate Army or DoD Component, this shall not be considered a no record determination.

(1) Appeals of adverse determinations from denial of records or "no record" determination, received by Army IDAs must be forwarded through the denying IDA to the Secretary of the Army (ATTN: OGC). On receipt of an appeal, the IDA will—

(i) Send the appeal to the Office of the Secretary of the Army, OGC, together with a copy of the documents that are the subject of the appeal. The cover letter will list all attachments and describe from where the records were obtained, *i.e.*, a PA system of records (including the applicable systems notice, or other. If a file does not include documentation described below, include the tab, and insert a page marked "not applicable" or "not used." The order and contents of FOIA file attachments follow: (Tab A or 1) The original FOIA request and envelope (if applicable); (Tab B or 2) The IDA denial letter; (Tab C or 3) Copies of all records entirely released, single-sided; (Tab D or 4) Copies of administrative processing documents, including extension letters and "no records" certificates, in chronological order; (Tab E or 5) Copies of all records partially denied or completely denied, single-sided. For records partially denied, mark in yellow highlighter (or other readable highlighter) those portions withheld; and (Tab F or 6) Legal opinions(s); and

(ii) Assist the OGC as requested during his or her consideration of the appeal.

(2) Appeals of denial of records made by the OGC, AAFES, shall be made to the Secretary of the Army when the Commander, AAFES, is an Army officer. Appeals of denial of records made by the OGC, AAFES, shall be made to the Secretary of the Air Force when the Commander is an Air Force officer.

(b) *Time of receipt.* A FOIA appeal has been received by an Army Activity when it reaches the office of an appellate authority having jurisdiction, the OGC. Misdirected appeals should be referred expeditiously to the OGC.

(c) *Time limits.* The requester shall be advised to file an appeal so that it is postmarked no later than 60 calendar days after the date of the initial denial letter. If no appeal is received, or if the